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# In the Supreme Court of the United States

OCTOBER TERM, 1954

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INDIAN TOWING COMPANY, INC., ET AL., PETITIONERS

*v.*

THE UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 213

INDIAN TOWING COMPANY, INC., ET AL., PETITIONERS

*v.*

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The order of the District Court was entered without an opinion. The *per curiam* opinion of the Court of Appeals is reported at 211 F. 2d 886.

### JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1954. The petition for a writ of certiorari was filed on July 15, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a claim may be maintained against the United States under the Federal Tort Claims Act for damages resulting from the failure of a navigational light to operate, the failure allegedly resulting from the neglect of Coast Guard personnel properly to inspect and service the light.

## STATUTES INVOLVED

1. The relevant provisions of the Federal Tort Claims Act [1] are as follows:

28 U.S.C. 1346(b).

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting

[1] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U.S.C. 921 *et seq.* While subsequently repealed, its provisions were reenacted into law, under the revision of the Judicial Code, as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. 14 U.S.C. 81 provides:

Aids to navigation authorized

In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States;

(2) aids to air navigation required to serve the needs of the armed forces of the United States as requested by the Secretary of the appropriate department within the National Military Establishment; and

(3) Loran stations (a) required to serve

the needs of the armed forces of the United States; or (b) required to serve the needs of the maritime commerce of the United States; or (c) required to serve the needs of the air commerce of the United States as determined by the Administrator of Civil Aeronautics.

Such aids to navigation other than loran stations shall be established and operated only within the United States, its Territories and possessions, the Trust Territory of the Pacific Islands, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located, and at other places where such aids to navigation have been established prior to June 26, 1948.

STATEMENT

This action was brought against the United States under the Federal Tort Claims Act to recover damages for property loss alleged to sustained as a result of negligence on the part of Coast Guard personnel in the maintenance of a lighthouse on Chandeleur Island, Louisiana.

The complaint (R. 2-6) alleged that petitioner Indian Towing Company is the owner of the tug *Navajo*. On October 1, 1951, while towing the barge *AS 16*, which had been chartered by petitioner Upper Mississippi Towing Corporation, the *Navajo* went aground on Chandeleur Island. The grounding allegedly was due solely to the failure of

the light on Chandeleur Island to function on that date, which failure, in turn, was due to the negligence of officers and enlisted personnel of the Coast Guard (R. 4-5). This alleged negligence consisted principally of (1) the inadequate examination of the light by one Chief Petty Officer Stone on his inspection trip of September 7, 1951, and (2) the failure of the Coast Guard to inspect the light between September 7, 1951 and October 1, 1951, in order to determine whether it was operating properly.[2] As a result of the grounding, sea water entered the cargo space of the barge *AS 16* which held 1,204.25 tons of triple superphosphate consigned to petitioner Minnesota Farm Bureau Service Company, and insured under a policy issued by petitioner United Fireman's Insurance Company. The phosphate was completely wetted and allegedly was damaged in the amount of $62,659.70.

The complaint was filed in the United States District Court for the Southern District of Mississippi on August 8, 1952 (R. 2). On motion of the United States (R. 5-6), the cause was transferred on September 15, 1952 to the Eastern District of Louisiana, the district in which the alleged negligence

[2] The Chandeleur Island lighthouse was "an unwatched light," i.e., no Coast Guard personnel were assigned to man it. It was described as such in the Light List outstanding on October 1, 1951. See United States Coast Guard, *Light List, Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158), pp. 3, 493. This publication also advised mariners that, while they have a high degree of reliability, unwatched lights "may become irregular, or extinguished." *Id.*, p. 5.

took place and the district in which one of the petitioners (Indian Towing Company) resided. (R. 7-8.)

The United States, on December 1, 1952, moved to dismiss the complaint (R. 8-9). On June 29, 1953, the District Court dismissed the complaint, relying on *Dalehite* v. *United States*, 346 U.S. 15 (R. 11). On appeal, the Court of Appeals affirmed in a *per curiam* opinion, citing *Dalehite* v. *United States*, 346 U. S. 15, and *Feres* v. *United States*, 340 U. S. 135.

## ARGUMENT

I. Petitioners contend that the court below misinterpreted the opinion of this Court in *Dalehite* v. *United States*, 346 U. S. 15, in holding that a claim based upon the failure of a navigational light to function did not come within the scope of the Federal Tort Claims Act. We submit, however, that the court below correctly applied the holdings of this Court in the *Dalehite* case, 346 U. S. at 43, and in *Feres* v. *United States*, 340 U. S. 135, 142, to the effect that the "Act did not create new causes of action where none existed before" and that it did not "visit the Government with novel and unprecedented liabilities."

In that part of the *Dalehite* opinion which considered whether the Federal Tort Claims Act had conferred jurisdiction upon district courts to enter judgments against the United States for negligent acts of the personnel of the Coast Guard, the Court stated (346 U. S. at 43-44):

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"* * * the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres v. United States*, 340 U. S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to "the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which de-

nied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz* v. *City of Beacon*, 295 N.Y. 51, 64 N.E. 2d 704. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.[3]

There is no question that the maintenance of aids to maritime navigation is peculiarly a governmental function with no private counterparts. In

[3] While the dissenting justices were of the view that plaintiffs were entitled to recovery, they did not take issue with the majority of the Court as to the Coast Guard aspect of the case. All had joined in the opinion in the *Feres* case on which the majority relied in holding that the Coast Guard was immune from liability under the Tort Claims Act (346 U.S. at 43-44); indeed, the *Feres* opinion was written by Mr. Justice Jackson, the author of the dissent in *Dalehite*. Instead, the dissenting justices found the circumstances surrounding the manufacture and shipment of the FGAN to afford a basis for imposing liability. And in doing so, they laid emphasis on the fact that activity of this nature has a private counterpart. "The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. * * * The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper." (346 U.S. at 60.)

maintaining the lighthouse on Chandeleur Island and approximately thirty-eight thousand other federally-established aids, the Coast Guard performs the general public duty outlined in 14 U.S.C. 81, *supra*, pp. 3-4, which provides in relevant part that "[i]n order to aid navigation and to prevent disasters, collisions, and wrecks of vessels, * * * the Coast Guard *may* establish, maintain, and operate: (1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States" (emphasis added). And these Coast Guard aids, which range from lightships on the one hand to unlighted buoys on the other, represent the overwhelming majority of the aids which are to be found on the navigable waters of the United States, its territories and possessions. Moreover, the Coast Guard has an absolute monopoly as to some types of aids. For example, it operates all of the 398 light stations (*i.e.*, a lighted aid on a fixed structure to which personnel are assigned for the purpose of watching the light).[4]

In addition to the maintenance of more than 90% of all navigational aids on the navigable waters of the United States, the Coast Guard exercises direct and close supervision over the roughly 3,300 so-called "private" aids to navigation. These private aids are erected and serviced by municipal, state, or federal agencies, or by private industry, but only after the approval of the Coast Guard has been

[4] U.S. Coast Guard, *Aids to Navigation Operated and Maintained by the United States Coast Guard* (June 30, 1953), p. 1.

obtained.[5] They generally take the form of unlighted buoys, day beacons, or lights upon fixed structures such as bridges,[6] and their construction is sanctioned where it has been administratively determined (1) that the aid is to be used exclusively by the agency or private person and will not serve general navigation, the interest which the Coast Guard is charged to protect,[7] *or* (2) if the aid is to

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[5] Congress has made it a criminal offense for any "person, or public body, or instrumentality, excluding the armed services," to "establish, erect, or maintain any aid to maritime navigation without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations". (14 U.S.C. 83). Pursuant to this Section, and 14 U.S.C. 92, which confers upon the Secretary of the Treasury broad powers in regard to carrying out the functions delegated to the Coast Guard, regulations have been promulgated governing the establishment and maintenance of private aids. These regulations cover such matters as the application procedure, the required characteristics of the private aid, inspection by the Coast Guard, and the circumstances in which a private aid must be removed. See 33 C.F.R. (1949 ed.) §§ 66.01-1—66.01-35. Private aids lawfully maintained receive the same protection against interference or obstruction as is afforded by law to Coast Guard aids to navigation. See 14 U.S.C. 84; 33 C.F.R. (1949 ed.) §§ 66.01-50, 70.01-1.

[6] Of the 3301 private aids in operation on June 30, 1953, 3073 fell into one of these categories. The balance were lighted buoys, fog signals, and shore-based radar stations. *Op. cit. supra*, fn. 4, at p. 4. There are no statistics available which reflect the proportion of the private aids which are maintained by governmental units as opposed to individuals or corporations.

[7] The Coast Guard in its manual on aids to navigation gives these examples of typical aids considered in the category of private aids. [U. S. Coast Guard, *Aids to Navigation* (C. G. 127, 1945), p. 1201]:

> (1) Standard buoy and lighting equipment employed by the United States Engineers to mark dredging areas.
>
> (2) Buoys, ranges and sound signals in channels dredged by private corporations to their property, which

be placed on a fixed structure, that the owner of the structure is legally obligated to do so."

We submit, therefore, that the instant case conforms in all respects with the rationale of the *Dalehite* and *Feres* cases. The activity whose misfunctioning gave rise to the claim was a purely governmental undertaking having no private counterpart.[9] There was no parallel liability existing be-

channels are used exclusively by the corporation's, or its contractor's, vessels.

(3) Aids established by the Army and Navy for their own use in connection with the approaches to loading piers, etc.

[8] Coast Guard regulations require all persons owning, occupying, or operating bridges over the navigable waters of the United States to maintain at their own expense such lights required for the safety of marine navigation as may be prescribed by the Commandant. 33 C.F.R. (1949 ed.) § 68.01-1. In addition, there is a non-delegable duty imposed upon the owner of a sunken wreck to mark it. 33 U.S.C. 409; 33 C.F.R. (1949 ed.) 64.01-1. Cf. *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4).

[9] Because municipalities and states do not maintain navigational aids for the public benefit, as they do police and fire departments and militias, there never has been the opportunity to assert private actionable rights of the precise kind that appellants claim here. But even if appellants are to be allowed to draw on the closest municipal analogy to the lighthouse and buoy—namely the traffic light and stop sign—their position is not improved. For it is almost universally accepted that a municipality is not liable for the negligent maintenance of traffic-control devices. *See e.g. Dorminey* v. *Montgomery*, 232 Ala. 47; *Avey* v. *West Palm Beach*, 152 Fla. 717; *Sandmann* v. *Sheehan*, 279 Ky. 614; *Auslander* v. *St. Louis*, 332 Mo. 145; *Vickers* v. *Camden*, 122 N.J.L. 14; *Kirk* v. *City of Muskogee*, 183 Okla. 536; *Martin* v. *Canton*, 41 Ohio App. 420; *Baker* v. *Waco*, 129 S.W. 2d 493 (Tex. Civ. App.). The only cases *contra* which we have been able to find are *Johnston* v. *City of East Moline*, 405 Ill. 460, and *Foley* v. *New York*, 294 N.Y. 275. In *Johnston*, the court held that the operation of traffic signals is not a governmental function. And in the

fore the passage of the Act and to hold the Act applicable here would visit the United States with novel and unprecedented liabilities.

2. Petitioners also urge (Pet., pp. 5-6) that there are a number of cases in lower federal courts which sustain their view and contend that it is unreasonable to assume that this Court disapproved those cases in the *Dalehite* case without specifically mentioning them. Of these cases, *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4) and *Mid-Central Fish Co.* v. *United States*, 112 F. Supp. 792 (W.D. Mo.) are the only cases which deal specifically with the point here involved.[9] The problem was necessarily before this Court in *Dalehite* because the Court of Appeals for the Fifth

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*Foley* case, liability was imposed upon the state for the negligent maintenance of a traffic signal on the ground that the New York vehicle and traffic law imposed a mandatory duty to maintain the signal. That no such mandatory duty has been imposed upon the Coast Guard in regard to navigational aids is clear. *Supra*, p. 9.

[9] *Wickman* v. *Inland Waterways Corp.*, 78 F. Supp. 284 (D. Minn.), dealt with the proposition that the Federal Tort Claims Act provided an exclusive remedy for allegedly tortious acts of employees of the Inland Waterways Corporation. *Lacey* v. *United States*, 98 F. Supp. 219 (D. Mass.), held that the United States was not liable under the Federal Tort Claims Act for the failure of the Coast Guard to effectuate a rescue. *State of Maryland, for Use of Pumphrey* v. *Manor Real Estate and Trust Company*, 176 F. 2d 414 (C.A. 4), held that a real estate board there involved was an agent or an employee of the United States and not an independent contractor. *Hernandez* v. *United States*, 112 F. Supp. 369 (D. Hawaii), dealt with the question of discretionary function, and *Moran* v. *United States*, 102 F. Supp. 275 (D. Conn.), held that a suit could be maintained under the Federal Tort Claims Act for death on the high seas.

Circuit in *In re Texas City Disaster Litigation*, 197 F. 2d 771, 780, had held that the United States was not liable for negligence of the Coast Guard. That part of the *Somerset Seafood* opinion which dealt with the question here involved and which relied upon *Cerri* v. *United States*, 80 F. Supp. 831 (N.D. Cal.), was expressly urged upon this Court in the *Dalehite* case by petitioner Pan-American Refining Corporation, et al. (Br., pp. 232-237). The problem was discussed by the Government in its brief in the *Dalehite* case, pp. 171-184; 203-212. We have assumed that, in agreeing with the decision below and with the Government's contention in this aspect of the case (see *supra*, pp. 6-8), this Court disapproved those parts of the *Somerset Seafood* and the *Cerri* opinions which held that the Tort Claims Act embraced claims for the non-functioning of a purely governmental activity. The *Mid-Central Fish Company* case, in so far as it relied upon the reasoning of the *Somerset Seafood* case and the *Cerri* case, is inconsistent with the *Feres* and *Dalehite* cases and was rejected by the Court of Appeals for the Eighth Circuit in *National Manufacturing Co.* v. *United States*, 210 F. 2d 263, 277-278, certiorari denied, 347 U. S. 967.

If we are wrong in our impression, and those parts of the *Somerset Seafood* and *Cerri* cases relied upon by petitioner (and other claimants) still retain precedential value, and this Court believes that the question is still open or requires further consideration, then we do not oppose the granting

of the writ in this case, for the question is of great importance and the position taken in this brief is consistently being urged by the Government upon lower federal courts as having the approval of this Court.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below is correct and that the petition for a writ of certiorari should be denied.

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AUGUST, 1954.